

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

LESLIE R. KELLY,

Plaintiff,

v.

MARTY SAPKO, et al.,

Defendants.

Civil Action No. 03-368 Erie

**MEMORANDUM ORDER**

This civil rights action was received by the Clerk of Court on November 7, 2003, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation [Doc. No. 64], filed on July 24, 2006, recommended that Defendants' motion to dismiss or, in the alternative, motion for summary judgment [Doc. No. 58] be granted in part and denied in part. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Plaintiff by certified mail and on Defendants. Objections were filed by Defendants on August 7, 2006 [Doc. 65]. After de novo review of the motion and documents in the case, together with the Report and Recommendation and the objections thereto, the following order is entered:

AND NOW, this 16<sup>th</sup> day of August, 2006;

IT IS HEREBY ORDERED that the Defendants' motion to dismiss or, in the alternative, motion for summary judgment [Doc. No. 58] is GRANTED in part and DENIED in part. Specifically, Defendants' motion with respect to Plaintiff's FTCA claim against the United States is GRANTED and such claim is dismissed for lack of subject matter jurisdiction based upon Plaintiff's failure to exhaust his administrative remedies; and Defendants' motion is DENIED with respect to Plaintiff's Eighth Amendment claim against the individual Defendants.

The Report and Recommendation [Doc. No. 64] of Magistrate Judge Baxter, filed

on July 24, 2006, is adopted as the opinion of the Court.

s/ Sean J. McLaughlin  
United States District Judge

cm: All parties of record  
Susan Paradise Baxter, U.S. Magistrate Judge